IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941

No. .....

FORT STREET UNION DEPOT COMPANY,
Petitioner,

vs.

MARGARET M. HILLEN, as Special Administratrix
of the Estate of Samuel Hillen, Deceased,
Respondent.

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

### I. *The Opinions of the Court Below*

No opinions were filed in the trial court. The opinions of the Circuit Court of Appeals have not yet been published but will be found on pages 174 and 181 of the record which is furnished herewith in accordance with Supreme Court Rule 38.

### II. *Jurisdiction*

The jurisdiction of this court is based upon the judicial code Section 240 as amended by the Act of February 13, 1925, 43 Statutes 938; U. S. C. A., Title 28, Section 347.

## III. *Statement of the Case*

The essential facts of the case are fully stated in the accompanying petition for certiorari and in the interests of brevity are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

## IV. *Specification of Errors and Argument Thereon*

1. The trial court erroneously held that even though the testimony of petitioner's witnesses was undisputed and unimpeached the jury nevertheless had the right to disbelieve such testimony, and the United States Circuit Court of Appeals erred in sustaining the trial judge.

The holding in the majority opinion of the Circuit Court of Appeals sanctions and approves the position taken by the trial judge so that in any case before him in the future he need not be bound by undisputed, credible and unimpeached testimony, but may submit the case to a jury with instructions that the jury may disbelieve such undisputed, credible and unimpeached testimony.

This is a complete departure from the Federal rule as laid down by this court in the cases of *Pennsylvania Railroad Co. v. Chamberlain*, 288 U. S. 333, 342, and *Chesapeake & Ohio Railway v. Martin*, 283 U. S. 209. In the *Martin* case this court (at p. 216) said:

> "We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt."

It is respectfully submitted that to correct this erroneous concept of legal jurisprudence this court should exercise its powers of supervision.

2. The trial court erred in refusing to direct a verdict for petitioner on the ground that there was nothing to submit to the jury except that which called for guess, speculation, and conjecture, and the Circuit Court of Appeals erred in refusing to give consideration to this ground for reversal, and erred in refusing to reverse the case on this ground.

It was the claim of respondent's declaration, filed in the trial court, that decedent was injured when he was struck by a broken, defective and protruding grab-iron on a car which was being moved by petitioner. At the trial, no proof was offered by respondent to show that there was a defective grab-iron on any car any where prior to the accident. Respondent's proof considered in its strongest light showed merely that decedent struck against a grab-iron and was knocked to the ground. Petitioner's proofs, on the other hand, showed conclusively that the grab-iron which respondent claims the decedent struck against was in proper place and condition up to the moment of the accident (R. 106, 109), and that immediately after the accident the break was found to be a new one (R. 87, 114) with one of the bolts which held the grab-iron newly broken and on the ground (R. 114). In this situation, it is respectfully submitted that petitioner was entitled to have the Circuit Court of Appeals give consideration to its claim made in that court as the ground for reversal that the trial judge erred in refusing to hold there was nothing to submit to the jury except that which called for guess, speculation and conjecture.

In another case, *Parker v. Gulf Refining Co.*, 80 Fed. (2d) 795, 796, the Circuit Court of Appeals, Sixth Circuit, held:

> "To submit to a jury a choice of probabilities is but to permit them to conjecture or guess, and where the evidence presents no more than such choice, it is not substantial."

In the case at bar the Circuit Court of Appeals, in its majority holding, refused to apply the principle of this case and refused to apply the rulings of this court as laid down in *Pa. R. R. Co. v. Chamberlain,* 288 U. S. 333 and *C. M. & St. P. Ry. v. Coogan,* 271 U. S. 472.

It is respectfully submitted that the Circuit Court of Appeals erred in refusing to reverse the judgment of the trial court on this ground.

3. The trial court erred in holding that petitioner was subject to the Federal Employers' Liability Act and that decedent at the time he was injured was within the class of employees contemplated by the Safety Appliance Act, and the Circuit Court of Appeals erred in sustaining this holding of the trial court.

Petitioner is not subject to the Federal Employers' Liability Act unless it is a common carrier by railroad.

> "In our opinion the words 'common carrier by railroad,' as used in the Act (Federal Employers' Liability Act) mean one who operates a railroad as a means of carrying for the public—that is to say, a railroad company acting as a common carrier." *Wells Fargo v. Taylor,* 254 U. S., 175.

The proofs at the trial established that it was a mere landlord of three railroad companies which independently operated into its depot. Petitioner does not engage in the transportation of either property or passengers and does not hold itself out as ready or willing to do so. It does not engage in a common or public calling, but in a purely private endeavor. It is not a terminal railroad company. Whether a depot company which is not a common carrier

may be held to be subject to the provisions of the Federal Employers' Liability Act, which applies only to common carriers by railroad, is a question which has never been decided by this court. The Circuit Court of Appeals erroneously considered petitioner depot company as a terminal railroad company performing services for the public (R. 180). In this, that court erred. Petitioner, in maintaining its depot as a landlord and in servicing the equipment of its tenants, is doing that which conceivably and indirectly is a benefit to the public, but, in maintaining its depot, petitioner does not engage in the transportation of persons or property and does not perform any transportation services as a common or public calling and is not, therefore, a common carrier by railroad. Its liability for injuries to employes must be measured by the common law and by the compensation laws of the State.

The Circuit Court of Appeals sustained the holding of the trial court that decedent was within the class of persons designed to be benefited by the provisions of Section 4 of the Safety Appliance Act. This court held in *San Francisco R. R. Co. v. Conarty*, 238 U. S. 243, that to be within the class of employees contemplated by Section 2 of the Safety Appliance Act, providing for automatic couplers, the employee must be engaged in or about the train or car having the safety device. The Circuit Court of Appeals refused to consider this case as being applicable. It was the claim of petitioner in the trial court and in the Circuit Court of Appeals that because decedent was not making any use of the grab-iron, which respondent claimed was defective, or the car upon which it was contained, that he was not within the provisions of Section 4 of the Safety Appliance Act, and, therefore, to entitle respondent to recover, proof of negligence must be made. The trial court held that proof of negligence was not necessary, and the Circuit Court of Appeals sustained this holding.

If Section 4 of the Safety Appliance Act is to be extended so as to include decedent, then it must be held that all persons are included within its provisions, and we submit that this is the function of the Congress, and until Congress speaks the Circuit Court of Appeals should be bound by the principle as laid down by this court in the Conarty case.

4. The Circuit Court of Appeals, by its majority holding (R. 176), erred in holding that the testimony of respondents' witness Drake (R. 122) was properly admitted by the trial court and entitled to weight as evidence. Reference is respectfully made to a discussion of the testimony of the so-called expert in the dissenting opinion of Judge Hicks (R. 182).

5. The grounds that decedent's negligence was the sole proximate cause of his injuries and that the testimony offered by respodnent as res gestae was inadmissible have been already covered under the heading "Reasons Relied On for the Allowance of the Writ" in the petition for certiorari, and for the sake of brevity will not be continued here.

Respectfully submitted,

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